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No. 2729.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ENNIS-BROWN COMPANY,
a Corporation,
Appellant and Complainant,

vs.

CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,
Appellees and Defendants.

Additional Points and Authorities of Appellees and Defendants.

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FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.

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ADDITIONAL POINTS AND AUTHORITIES FOR APPELLEES AND DEFENDANTS.

These additional Points and Authorities are presented to the court pursuant to leave given on oral argument. They are supplemental to those already printed and filed and to the oral argument; and appellees adhere to all that has heretofore been contended. There seems after fuller reading to be little which needs to be added. The additions follow designated by *letter* with parenthetical references to

Appellees' Points and Authorities and to Appellant's Brief; so that matter to which this is additional or responsive may be identified easily.

The appellees have endeavored by a seasonable objection to appellant's praecipe (Trans. p. 90) to eliminate all needless matter from the record prepared for this appeal. There are papers in the record which might have been left out by strict compliance with New Equity Rule 75(c). Nevertheless counsel take it that this court will consider this done because it ought to have been done, and will consider the salient questions as if only the bill and amendments, the motions to dismiss or transfer, and the decree were incorporated with the appeal papers.

A.

The point that objection to jurisdiction in equity was not waived has been made (Appellees' Points, pp. 39-43) in response to appellant's contention (Appellant's Brief, p. 81 *et seq.*)

It may be added that such objection could not be waived if the court chose to consider it. An objection to the jurisdiction of the suit, as distinguised from that of the persons, is not waived by mere failure to object. The court may decline of its own motion to exercise an improper jurisdiction.

> "If it develops, upon the hearing, that only legal rights or rights cognizable in a court of

> law are involved, the court *ex mero motu* will dimiss the bill." *New Jersey, etc. Lumber Co. v. Gardner-Lacy, etc. Co.*, 178 Fed. 772, 781. [This was a quiet title suit presenting substantially the same questions as to possession which are now at bar.]

Whatever the jurisdiction may be appears upon the face of the bill, and objection to the jurisdiction can be raised at any time, or at any stage of the case, even in the Appellate Court and even upon the court's own motion.

See *Southern Pacific Railroad Company v. United States*, 200 U. S. 341, 50 L. Ed. 507, wherein it is said:

> "No objection was made to jurisdiction of the court as a court of equity by any pleading or before the hearing. It is undoubtedly true that a suit in equity cannot be maintained when there is a plain, adequate and complete remedy at law. Such is the mandate of the Revised Statutes (Rev. Stat., Sec. 723, U. S. Comp. Stat. 1901, p. 583) as well as the general rule in equity. Lewis v. Cocks, 23 Wall. 466, 23 L. Ed. 70; Killian v. Ebbinghaus, 110 U. S. 568, 28 L. Ed. 246, 4 Sup. Ct. Rep. 232; Litchfield v Ballou, 114 U. S. 190, 29 L. Ed. 132, 5 Sup. Ct. Rep. 820; Allen v. Pullman's Palace Car Co., 139 U. S. 658, 35 L. Ed. 303, 11 Sup. Ct. Rep. 682. It is also true that this objection need not always be raised by some pleading, but may be presented on the hearing even in the Appellate Court; and, if not suggested by counsel, may be enforced by the court on its own motion. See authorities just cited. But, on the other hand, it is equally true that where the objection that the plaintiff

has an adequate remedy at law is not made until the hearing, and the subject-matter is of a class over which a court of equity has jurisdiction, the court is not necessarily obliged to entertain it, even though, if taken *in limine*, it might have been worthy of attention."

And in *Street Grading District No. 60 v. Hagadorn*, 186 Fed. 451-457, it was held:

"It is also contended that, as no objection was made to the jurisdiction in equity on the ground that there was an adequate remedy at law, such objection was waived and cannot be raised for the first time in this court. This, we think, is untenable. The rule frequently announced and fully recognized that the existence of an adequate remedy at law cannot be raised for the first time in an appellate court is always subject to the qualification that jurisdiction over the subject-matter exists, and that the trial court is competent to grant the relief prayed for. Lewis v. Cocks, 23 Wall. 466, 23 L. Ed. 70; Reynes v. Dumont, 130 U. S. 354, 395, 9 Sup. Ct. 486, 32 L. Ed. 934; Brown v. Lake Superior Iron Co., 134 U. S. 530, 536, 10 Sup. Ct. 604, 33 L Ed. 1021; Allen v. Pullman's Palace Car Co., 139 U. S. 658, 662, 11 Sup. Ct. 682, 35 L. Ed. 303; Southern Pacific v. United States, 200 U. S. 341, 349, 26 Sup. Ct. 296, 50 L. Ed. 507. The doctrine of these cases is that the court for its own protection and *sua sponte*, 'may prevent matters purely cognizable at law from being drawn into chancery at the pleasure of the parties interested.'"

See also *Kansas City Southern Ry. Co. v. Quigley, et al.*, 181 Fed. 190-196, in which it is held whether

a bill states a cause of equitable cognizance is jurisdictional. The question, therefore, may be raised by the court on its own motion; and since the lower court might have dismissed this case of its own motion on finding no cause in equity made out, the power to do so remained to it and the decree of dismissal is sustainable without regard to waiver or non-waiver.

B.

Complainant-appellant relies on the allegations in its amendment to the amended bill, viz., allegations that public interest and welfare are opposed to exclusive occupancy of the described land by defendant Southern Pacific Company.

The theory seems to be (see Appellant's Brief, p. 47 *et seq.*) that some equity can be drawn to complainant, a private claimant, by asserting that defendant, a quasi public occupant, has a right inferior to the general public's alleged higher use and necessity. The bill does not in any way plead anything which entitles complainant to represent the public, nor could a decree follow which would be effective in favor of the public which is not a party plaintiff.

If paragraph IX of the bill in its final form (Trans. p. 18) means that the lands are such as the public may condemn to a superior use, then the obviously adequate legal remedy is a condemnation proceeding under California Code Civ. Proc, Sec.

1238 *et seq.* On the other hand, if it means that the public already owns such superior right and use, a suit by the public or its accredited representative must be brought with appropriate allegations of the right to sue.

A position quite similar to that of complainant here was made in an ejectment action against a railroad company to recover all of a 400-foot strip except a 25-foot strip used for tracks. Tenants of the company were in possession of the disputed part. In reversing the judgment rendered against the company the court said:

> "The precise character of the business carried on by such tenants is not disclosed to us, but we are permitted to presume that it is consistent with the public duties and purposes of the railroad company; and at any rate a forfeiture for misuser could not be enforced in a private action." Northern Pac. R. Co. v. Smith, 171 U. S. 260, at 276, 43 L. Ed. 157.

This is a complete answer to any claim either at law or in equity which complainant makes by the present bill. The same reasons move the court in a late Federal case to deny the right to oust a public common carrier from enjoyment of its easement charged with a public use. See *Western Union Tel. Co. v. Georgia R. & B. Co.*, 227 Fed. 276, at p. 290, citing *Northern Pac. R. Co. v. Smith, supra,* and other cases.

C.

Dismissal of the bill without transfer was proper, because as shown (Appellee's Points and Authorities, p. 37, also Trans. p. 45) the complainant declined the opportunity of repleader; hence it cannot be told what legal cause of action it would rely on to claim a transfer. The court can see that a cause of action for damages *might have existed* in favor of the owner of the land at the time it was appropriated by defendant Southern Pacific Company, or its predecessor, to the public use; but nothing appears to show that such a cause *does now exist* or that it belongs to complainant. There was nothing to transfer in that aspect of the bill. Viewing it as a bill to oust defendants in favor of a higher public use, a similar and equally fatal defect in parties plaintiff and in the substantial allegations appears. It is not a case of complainant's pleading itself in the wrong court, but of pleading itself out of court.

Complainant-appellant relies on amendments to the Judicial Code, Secs. 274a, 274b. For all present purposes these do no more than is promulgated by New Equity Rules 22 and 23, and their application has been discussed in Appellees' Points and Authorities, p. 37. None of the cases cited by Appellant's Brief, p. 111, hold that a futile transfer should be made under the Rules. In all of them there was an apparent right or liability to be tried between the parties. The obvious purpose of New Equity Rule

22 and of the above amendments to the Judicial Code was to accelerate the proper disposition of the case in one action by suitable amendments and transfer to the proper side of the court.

The bill in its final form stated no cause in equity for reasons already fully presented. It made no case for ejectment because of the nature of the occupation pleaded by complaint. It made no case for damages because complainant did not by allegations entitle itself to recover damages. It made no case therefore on any view of the bill, and when complainant declined to amend no alternative but dismissal remained to the trial court. New Equity Rule 29 contemplates dismissals for "insufficiency of fact;" and refutes any suggestion that Rule 22 requires a transfer whenever there is insufficiency of facts to make out an equity case. It was never meant to force the circuity of a transfer in order to enter a final adverse decree for defenses and deficiencies apparent on the face of the bill.

D.

Appellant argues (Appellant's Brief, p. 73 *et seq.*) that the remedy by action for damages is inadequate because it would admit rightful possession in the defendants, whereas only a small portion is in rightful possession or devoted to public uses. This proves too much. It shows that ejectment would lie as to

the portions not devoted to public use and damages for the other portion.

But there is an equally decisive answer to this argument furnished by paragraphs VIII and IX of complainant's bill in its finally amended form. (Trans. pp. 16-18.) From these allegations we learn that Southern Pacific Company was in possession of all the land. Part of it was used for "main tracks," and the remainder for "switching tracks," "freight sheds" and "sheds used as a wharf." All these are within the purposes enumerated in California Code Civ. Proc., Sec. 1238, Subd. 4, for which right of eminent domain may be exercised. Wharves and "railroads," not merely "main tracks," are expressly mentioned. Hence the complaint alleges that *all* the land is already devoted to uses which will support a condemnation or other acquisition for the public. This precludes all actions except for damages. See

Gordon v. Cadwalader, 51 Cal. Dec. 328 (decided March 8, 1916);
Gurnsey v. Northern California Power Co., 160 Cal. 699;
Northern Pac. R. Co. v. Smith, 171 U. S. 260, 176, 43 L. Ed. 157, 163;
Roberts v. Northern Pac. R. Co., 158 U. S. 1, 39 L. Ed. 873.

A railroad can condemn for wharves and freight sheds.

Vallejo & N. R. Co. v. Reed Orchard Co., 169 Cal. 545;
Central Pac. R. Co. v. Feldman, 152 Cal. 303.

California Civil Code, Sec. 465, Subd. 4, empowers railroads to lay out their roads "not exceeding ten rods wide, and to construct and maintain the same with *one or more tracks* and with such *appendages and adjuncts* as may be necessary for the convenient use of the same."

The same section in Subd. 9, empowers them "to erect and maintain all necessary and convenient buildings, stations, depots," etc. These measure the purposes comprised in the word "railroad" found in Code Civ. Proc., Sec. 1238, Subd. 4, above referred to.

There is nothing to show that more than ten rods has been taken and all the pleaded uses are within the foregoing statutes and decisions.

Appellant argues that its suit is maintainable in equity, supporting such argument by the citation of various cases in which equity is said to have entertained jurisdiction of a suit for injunction against a public service corporation which was occupying and claiming land without right. It is not easy to see how a case of injunction for trespass under color of eminent domain, or injunction against interference with easements under color of eminent domain, can be a precedent for the maintenance of a suit in equity by one out of possession to quiet his title against the

claims of a railroad company occupying land which it had the right to acquire by condemnation. The injunction cases, by a well-known rule of equity must be predicated upon an undisputed legal title in the plaintiff, whilst the very object of the suit at bar was to quiet a dispute in titles. There is no analogy between the two classes of cases from which it may be reasoned that equity will entertain the suit to quiet title, because it might have entertained a suit for injunction if seasonably brought.

In Lewis Eminent Domain, 3d Ed., Secs. 901 to 953 inclusive, are discussed the remedies for a wrongful interference with property under color of eminent domain. The only equitable remedies mentioned in the one hundred pages comprised in these sections from Mr. Lewis' work are injunctions, and all of such injunctions proceed either on the theory of restraining the commission of a continuing trespass on the plaintiff's land or upon the theory of restraining a disturbance of some easement claimed by the plaintiff in a street or other place occupied by the corporation.

The bill of complaint in its finally amended form in the present case has none of the characteristics of a bill to prevent a trespass or the encroachment of defendants upon some easement claimed by complainants, but its theory is that the defendants are wholly without right, and that their title is a cloud for the court to quiet by its decree.

E.

Appellant's argument (Appellant's Brief, p. 81 *et seq.*) that the answer has imparted equitable jurisdiction even if the bill lacked it is not well founded. When complainant added paragraphs VIII and IX to the bill a *new case* was made, and the whole repoened for any appropriate objection or pleading. This is explained in *State v. Mitchell,* 104 Tenn. 336, 58 S. W. 367 (quoted from by appellant, p. 94), also in Appellees' Points and Authorities (p. 40 *et seq.*).

As to the plea of equitable estoppel being a legal defense, it is now expressly enacted by Judicial Code, Sec. 274b, that in all actions at law equitable defenses may be interposed by answer. Therefore interposing them can no longer be regarded as giving an equitable character to the action.

The argument that objection was waived is further answered, ante under letter "A" of this Brief.

F.

It was practically conceded on oral argument that the attempted consolidation was abortive. Appellee's oral argument on that point was stopped by the court. It may be passed with a simple reference to the Transcript. It there appears that the petition was for a single appeal by the one complainant Ennis-Brown Company (Trans. p. 48). The order permitting appeal (Trans. p. 55) and the bond (Trans. p. 56) are also single and run to an appeal by that one

complainant without other being joined. The appeal before this court is therefore in but the one suit entitled Ennis-Brown Company, a Corporation, against Central Pacific Railway Company, a Corporation, Southern Pacific Company, a Corporation. The other cases mentioned in the order of the court (Trans. pp. 42-43) have not been brought up.

G.

It is impossible to comment on each and every case cited by appellant as authority. Many of them are cited to general principles which are true enough, but which do not rule this appeal. It may be helpful to the court to comment on them by groups as cited under the several heads of Appellant's Brief, viz.:

Suits under California Code Civ. Proc., Secs. 738, 379, 380, are not equitable *per se* as stated by Appellant (Appellant's Brief, p. 12). The Supreme Court of California says such a suit "is a statutory action" which may be either legal or equitable.

Donahue v. Meister, 88 Cal. 121, 127.

The cases cited by appellant (Appellant's Brief, p. 12) no doubt hold that enlarged equitable rights created by state statutes will be enforced in Federal equity courts. That is not the point. Appellant is trying to keep a bill in court which pleads a simple cause at law, simply because in a state court having no distinct equity procedure might, under the statute, ignore such distinction.

Whether the bill might satisfy the California statute (Appellant's Brief, p. 24) is wholly irrelevant to the question which side of the Federal courts should entertain it. However if that be gone into, it will be found that after the last amendment the bill was pleaded out of California Code Civ. Proc., Sec. 738, and stated no cause of action under it even by California practice. (See this argued Appellees' Points, p. 25 *et seq.*)

The cases cited by its counsel do not support Appellant in the statement (Appellant's Brief, p. 29) that the Federal courts will take jurisdiction of a bill which has only the allegations required for a state court. On reading those cases it will be found always that plaintiff had possession or else the land was wild or unoccupied, or else that possession was immaterial because there was another ground for jurisdiction. The removal of clouds is an ancient head of equity; but every case where Federal Equity Courts have retained quiet title suits falls into one of the following classes:

(a) Where plaintiff had possession alleging it;

(b) Where the land was wild or vacant and neither had possession;

(c) Where possession was put in issue necessitating trial of the fact;

(d) Where some other equity supported the jurisdiction, such as accounting; and quieting of title was a mere incident.

Appellant has cited some cases, notably *Ely v. New Mexico R. Co.*, 129 U. S. 291, 32 L. Ed. 688, which were appeals from state or territorial courts to the United States Supreme Court. The procedure approved in such cases is the local and not the Federal procedure. They are not in point here.

None of the cases (Appellant's Brief, pp. 36-39) support the argument that possession alleged to be in one defendant can be ignored for the purpose of retaining the bill as to another defendant. To do this would be to deny a defendant its legal defenses and right of trial by jury by the mere expedient of joining some other party and giving the allegations an equitable cast.

All the cases cited by appellant at page 40 of its brief fail to help its case. They fall within the four classes just mentioned, while appellant's bill falls without them.

The same is true of cases cited at pp. 45-73 of its brief, so far as they are quiet title suits. Most of them are not such. Some are based on independent equities. Some are ejectment actions. Some are eminent domain cases involving streets of which no one could be in possession. Some suggest *a* remedy in equity for a taking under color of eminent domain, but not *this* remedy which appellant seeks.

Cases cited by appellant from p. 73 to 150 of its brief have been met, as counsel believe, by arguments herein and in Appellees' Points and Authorities.

and by those made orally. Most of the cases are sound and the holdings correct, but their doctrine inapplicable to present questions. The labor of reading all of them would not be lessened by a piecemeal analysis. Increased labor might be imposed on the court by the great length of brief required for such analysis. Hence we pass them.

Appellant's Brief, p. 111. This was met by Appellees' Points at p. 36. If appellant chose not to amend so as to make a transferable case, it cannot complain of a dismissal on the bill as it stood.

The same is true of appellant's argument that dismissal should have been without prejudice (Appellant's Brief, p. 112).

Dated April 17, 1916.

Respectfully submitted,

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